

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

with affidavit

75-6070

To be argued by
STUART I. PARKER

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6070

P/S

UNITED STATES OF AMERICA,

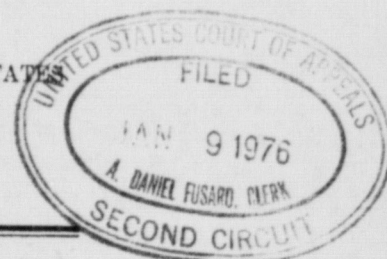
Appellee,

—v.—

VARIOUS ARTICLES OF OBSCENE MERCHANDISE
SCHEDULE NO. 1213,

Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK



BRIEF FOR PLAINTIFF-APPELLEE

THOMAS J. CAHILL,
*United States Attorney for the
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STUART I. PARKER,
STEVEN J. GLASSMAN,
*Assistant United States Attorneys,
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-v-

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

This is an appeal from a final judgment of the United States District Court for the Southern District of New York entered on June 27, 1975 ordering that obscene advertising circulars contained in a letter size envelope addressed to the Claimant-Appellant, Bernhardt J. Hurwood, and seized by the United States Customs Service, pursuant

to 19 U.S.C. § 1305, be forfeited and destroyed. The trial of this action took place on May 16, 1975 and in a written decision, dated June 12, 1975, Judge Wyatt granted a judgment of forfeiture to the Government. Judge Wyatt's decision is reported at 395 F. Supp. 791.

Issue Presented

Did the District Court properly rule that the seizure of the envelope addressed to Mr. Hurwood was lawful?

Statement of the Case

This in rem action was commenced by the United States on March 20, 1975 to forfeit allegedly obscene articles of merchandise mailed from abroad and seized by the United States Customs Service, pursuant to 19 U.S.C. § 1305. The articles against which the action was brought are listed on the schedule annexed to the complaint. Notice was given the persons to whom the articles were addressed of their right to claim the articles and contest the action.

On May 8, 1975 a partial default judgment was entered forfeiting those articles for which no claims were made. On May 16, 1975 a trial was held with respect to the nine articles on the Schedule for which claims were made.

At the trial the only claimant to appear was Mr. Hurwood.

Mr. Hurwood conceded that the advertising circulars he was claiming (Exhibit 4) were obscene (13a, 25a),* but contended that the letter size envelope (Exhibit 4-A) in which they were contained was unlawfully opened by the Customs Service. At Mr. Hurwood's request, the Court agreed to reserve decision on his claim until after the submission of briefs.** On June 12, 1975 the Court filed its decision, holding that the Customs Service had lawfully seized and opened the envelope addressed to Mr. Hurwood.

Statement of Facts

Exhibit 4-A is a 6 1/2 by 4 1/2 inch envelope bearing an airmail sticker. It was hand-addressed to Mr. Hurwood and bears a United Kingdom return address.

* Unless otherwise indicated, references are to pages in the Appendix.

** A partial judgment ordering the forfeiture and destruction of the articles of merchandise claimed by persons other than Mr. Hurwood was entered May 22, 1975 and has not been appealed.

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The envelope was opened by Vincent Ruisi, who has been employed by the United States Customs Service for 15 years, the last six of which he has served as an officer in the Prohibited Imports Section of the Imports Compliance Branch of the Customs Service (16a).

Officer Ruisi testified that he opened Exhibit 4-A because the feel and thickness of the envelope led him to conclude that it contained commercial matter rather than a letter and because the handwriting on the envelope and its United Kingdom return address were the same as those on many other envelopes containing allegedly obscene articles which were seized at about the same time (26a, 28a-29a).

ARGUMENT

POINT I

The Seizure and Opening of the
Letter Size Envelope Addressed
to Mr. Hurwood was Lawful

It is well settled that customs officers have the power to conduct a "border search" on the basis of a mere suspicion that the customs laws have been violated. United States v. Doe, 472 F.2d 982 (2d Cir.) (Mansfield, J.), cert. denied 411 U.S. 969 (1973); United States v. Glaziou,

402 F.2d 8 (2d Cir. 1968) (Waterman, J.), cert. denied, 393 U.S. 1121 (1969). The "mere suspicion" standard has been held by this Court in United States v. Doe, supra, to apply to the opening by customs officials of packages entering the United States through the mails, and by the Fifth, Seventh and Ninth Circuits to the opening by customs officials of international letter mail. United States v. King, 517 F.2d 350 (5th Cir. 1975); United States v. Bolin, 514 F.2d 554 (7th Cir. 1975); United States v. Odland, 502 F.2d 148 (7th Cir.), cert. denied, 419 U.S. 1088 (1974); United States v. Barclift, 514 F.2d 1073 (9th Cir. 1975).

In Odland, supra, where New York customs officials opened a letter size envelope mailed from Columbia, the Court held that "the Government is free to spotcheck incoming international mail at the port of entry, or to inspect all such mail, or to inspect any such mail which attracts the inspector's attention." 502 F.2d at 151.

In King, supra, which involved a Fourth Amendment attack on the opening of a letter size envelope by a customs official without probable cause, the Court said:

"The government has a traditional and well recognized right to examine both persons and merchandise entering the country. . . . This right

to search for possible customs violations extends also to incoming first class mail." 517 F.2d 352-353.

Mr. Hurwood would have this Court ignore the law in the other Circuits and adopt a more stringent standard for the opening of international letter mail than for customs searches of individuals entering the United States at the border. However, as Judge Mansfield noted in United States v. Doe, supra, there is no justification for giving "customs agents less leeway in preventing importation of mailed contraband than when such merchandise is imported in person." 472 F.2d at 985. This is particular so because the opening of a letter size envelope by a customs official to determine whether it contains contraband is "far less intrusive than searches of individuals or of their immediate effects." United States v. Doe, supra, 472 F.2d at 985; United States v. King, supra, 417 F.2d at 354.

In summary, we submit that Judge Wyatt correctly held that the opening of the envelope addressed

to Mr. Hurwood by a customs officer was proper because it came from outside the country.*

POINT II

The Seizure and Opening of the Letter Size Envelope Addressed to Mr. Hurwood was Authorized by the Customs Laws

There is nothing to Mr. Hurwood's contention that 19 U.S.C. § 1305 does not provide for the seizure of obscene illustrated advertising if it is contained in a letter envelope rather than a package (Appellant's brief, p. 9). The statute prohibits the importation into the United States of any "obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure or image on or of paper or other material. . . ." The part of the statute quoted by Mr. Hurwood at page 9 of his brief simply provides that

* Judge Wyatt alternatively held that if the opening of foreign mail can only be justified by a "suspicion based on reason," the customs officer here had such a suspicion. See United States v. Various Articles of Obscene Merchandise, Schedule No. 896, 363 F. Supp. 165 (S.D.N.Y. 1973) (Duffy, J.). In this connection, we note that the officer who opened the envelope was experienced (16a); that by feeling the envelope he could tell it did not contain a letter (26a); and that he recognized the handwriting and return address on the envelope (16a).

such articles shall not be admitted into the United States whether imported separately or in a package with goods entitled to enter the United States. It does not provide that obscene articles may only be seized if in a package.

To state the obvious, the fact the articles were imported "separately" in an envelope does not take them out of the purview of 19 U.S.C. § 1305. See United States v. Various Articles of Obscene Merchandise, Schedule No. 896, supra. Moreover, both the Postal Service and Customs Service regulations provide that non-diplomatic mail originating outside the United States is subject to examination by the Customs Service. 39 C.F.R. § 61.1 and 19 C.F.R. § 145.2.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, New York
January 9, 1976

Respectfully submitted,

THOMAS J. CAHILL
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Southern District of New York,
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STUART I. PARKER
STEVEN J. GLASSMAN,
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-6070

Pauline P. Troia,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 9th day of January, 1976 s he served ~~copy~~ 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Alfred F. Koller, Jr.
845 Third Ave.
New York, NY 10022

And deponent further says s he sealed the said envelope and placed the same in the mail ~~choce~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Pauline L. Troia

9th day of January, 19 76

Laeph Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977